No. 80-777

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FRANK BLACKBURN,
Petitioner,

versus

IRVIN THOMAS,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

I. Whether this Court's decision in *Ballew v. Georgia*, 435 U.S. 223 (1978), concerning the right to trial by jury under the Sixth Amendment, should be applied retroactively to final judgments under collateral attack pursuant to the case of *Brown v. Louisiana*, ____ U.S. ____, 100 S.Ct. 2214 (1980)?

II. Whether the Court below could reach the merits of appellee's attack on the composition of the jury which he failed to assert at trial without finding a showing of cause and prejudice for a collateral attack, when a lower state court performed only a cursory review of the merits of his habeas corpus application?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FRANK BLACKBURN,
Petitioner,

versus

IRVIN THOMAS,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR CERTIORARI

MAY IT PLEASE THE COURT:

Petitioner, Frank Blackburn, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 7, 1980, rehearing denied October 9, 1980.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in *Thomas v. Blackburn,* is found in the Appendix hereto and is reported at 623 F.2d 383. The opinion of the District Court for the Western District of Louisiana which is unpublished is found in the appendix hereto. (Docket No. 78-1399). The denial of writs by the Louisiana Supreme Court is found in the appendix hereto and is reported at 361 So.2d 1218 (1978). The opinion of the 14th Judicial District Court for the State of Louisiana, which is unpublished is found in the appendix hereto. (Docket No. 2593-72).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on August 7, 1980, rehearing denied October 9, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. VI.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and dis-

trict wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. CONST. Amend. XIV, Sec. 1.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

LA. CODE CRIMINAL PROCEDURE ART. 841.

"An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he de-

sires the court to take, or of his objections to the action of the court, and the grounds therefor. The requirement of an objection shall not apply to the court's ruling on any written motion."

LA. CONST. ART. 7, SEC. 41 (1921)

"The Legislature shall provide for the election and drawing of competent and intelligent jurors for the trial of civil and criminal cases; provided, however, that no woman shall be drawn for jury service unless she shall have previously filed with the clerk of the District Court a written declaration of her desire to be subject to such service. All cases in which the punishment may not be at hard labor shall, until otherwise provided by law, be tried by the judge without a jury. Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict."

STATEMENT OF THE CASE

Irvin Thomas was charged on February 28, 1972 with distribution of cocaine and heroin in violation of

La. R.S. 40:971. Inasmuch as the penalty for the offense for which he was charged was not necessarily punishment at hard labor, the law at the time provided that he be tried by a jury of five, all of whom must concur to render a verdict.[1] On November 27, 1972 he was convicted and sentenced to serve twenty-seven years in the custody of the Louisiana Department of Corrections from which no appeal was perfected.

In May, 1978, Thomas filed a writ of habeas corpus maintaining that the five member jury deprived him of his rights guaranteed by the Sixth Amendment of the United States Constitution. Upon denial of his writ in the State district court and subsequent denial by the Louisiana Supreme Court on September 1, 1978, he filed his writ of habeas corpus in the United States District Court for the Western District of Louisiana.

The United States District Court, having found defense counsel had legitimate cause for having failed to object to the size of the jury and that petitioner had been prejudiced, vacated the judgment of conviction and sentence imposed upon Thomas by the Fourteenth Judicial District Court, Parish of Calcasieu. The United States District Court's opinion was appealed and on August 7, 1980, United States Court of Appeals

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1 The penalty provided for imprisonment at hard labor for not more than thirty years or a fine of not more than $15,000 or both and a five man jury was proper when the penalty provision authorized a fine and did not necessarily require imprisonment at hard labor. *State v. Martin*, 290 So.2d 872 (La. 1974).

for the Fifth Circuit issued an opinion affirming the United States District Court's opinion granting the writ. On October 9, 1980 a rehearing was denied.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. Only Cases On Direct Review And Not Final Judgments Under Collateral Attack Should Be Given Retroactive Treatment Under The Rationale Of *Brown v. Louisiana.*

The United States Court of Appeals for the Fifth Circuit held that the retroactivity rationale set forth by this Court in *Brown v. Louisiana,* ____ U.S. ____, 100 S.Ct. 2214 (1980) is applicable to cases which are on direct review as well as to final judgments under collateral attack. However, in the case of *Brown v. Louisiana, supra,* four justices supported the retroactive application of *Burch v. Louisiana,* 441 U.S. 130 (1979) to both cases on direct review and to final judgments under collateral attack; two justices stated that only cases on direct review should be treated retroactively, and three justices dissented to the retroactive application entirely. Thus, the decision of the Court below was not in line with the plurality of this Court, in that five justices appear to have failed to support the application of *Brown v. Louisiana, supra,* to final judgments under collateral attack. Accordingly, the case of *Ballew v. Georgia,* 435

U.S. 223 (1978) should not be given retroactive application to a final judgment under collateral attack.

Additionally, by concluding that under the *Brown* rationale, *supra*, *Ballew v. Georgia*, should be given retroactive application in the case at bar, the court below in effect is treating cases which are under direct review and those in which a final judgment is under collateral attack synonymously. Prior decisions of this Court discourage this type of application. *Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974). *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940). *Linkletter v. Walker*, 381 U.S. 618 (1965).

In the case of *Bradley v. School Board of Richmond*, *supra*, this Court declared:

> "This court in the past has recognized a distinction between the application of a change of law that takes place while a case is on direct review on the one hand, and its effect on a final judgment under collateral attack on the other hand."

In *Chicot County Drainage District v. Baxter State Bank*, *supra*, this Court suggested that the effect of a subsequent ruling of invalidity on a prior final judgment under collateral attack is subject to no fixed "principle of absolute retroactive invalidity" but depends upon consideration of "particular relations . . . and particular conduct."

After considering the cases mentioned above, it is evident that the manner in which the Court below applied *Brown v. Louisiana, supra,* to the case in point was erroneous, in that it disregarded the distinction between cases under direct review and final judgments under collateral attack.

We must admit that we have no statistics on the number of prisoners who will be effected by a retroactive application of *Ballew.* However, we do know at this time there is pending in the United States Court of Appeals for the Fifth Circuit the case of *Ulysses Smith v. Blackburn,* Docket No. 79-3451, and in the United States District Court for the Eastern District of Louisiana, *Clarence Williams v. Blackburn,* Docket No. 79-3622 and in the United States District Court for the Western District of Louisiana, *McArthur Davis v. Blackburn,* Docket No. 79-0930, which all are collateral attacks on convictions by five man juries. There may be other cases pending or persons incarcerated by conviction of a five member jury of which we are not aware.

While the extent of persons affected by a retroactive application of *Ballew v. Georgia* is not clear, the ruling in the case at bar should be applicable to habeas corpus decisions relying upon *Burch v. Louisiana, supra.* As seen by the decision of the Court of Appeal the instant case relies upon *Brown v. Louisiana, supra,* which applied *Burch* retroactively to a direct appeal. There are undoubtedly a substantial number of persons now incarcerated by a verdict of 5 out of 6 jurors who may raise the issue by a

collateral attack. Thus, it would appear the resolution of the issue in the case at bar will be significant to more than those convicted by five member juries for it should be applicable to those bringing collateral attacks under *Burch*.

In summary, the United States Court of Appeals for the Fifth Circuit's application of *Brown v. Louisiana, supra*, to the case at bar, and its synonymous treatment of cases under direct review and final judgments under collateral attack is in direct conflict with prior decisions of this Court, compelling the granting of a Writ of Certiorari.

II. If An Individual Raises His Constitutional Claim In A Federal Habeas Corpus Proceeding When He Had Failed To Assert This Claim At The State Trial Level, A Federal Court Cannot Review The Merits Of The Claim Unless A Lower State Court Has Done So.

The Louisiana Code of Criminal Procedure Article 841 provides that an irregularity or error cannot be availed of after verdict unless it is objected to at the time of occurrence.

In the case at bar, the appellee has clearly breached the above-mentioned procedural rule in that his challenge to the constitutionality of the five-man jury did

not materialize until he filed for a writ of habeas corpus.

It is respectfully submitted that in the absence of "cause" and "prejudice", the Court below erred by reviewing the merits and concluding that the appellee may properly raise in a Federal Habeas Corpus proceeding his Constitutional claim when he had failed to assert this same allegation at the State trial level. *Wainwright v. Sykes*, 433 U.S. 72 (1977), *Davis v. United States*, 411 U.S. 233 (1973), *Francis v. Henderson*, 425 U.S. 536 (1976).

Relying on the cases of *Castaneda v. Partida*, 430 U.S. 482 (1977) and *Franks v. Delaware*, 438 U.S. 154 (1978), the Court below concluded that it could reach the merits since the State court had.

It is our contention that *Castaneda v. Partida, supra*, and *Franks v. Delaware, supra*, are not applicable to the case in point since the State courts did not actually review the merits.

In *Castaneda*, the Court in a footnote found they were free to consider the merits since the Texas court had. It must be noted while Partida did not raise his claim of discrimination in the grand jury selection prior to trial, he did present the issue on a motion for new trial in the State District Court. There was a hearing and denial on the merits and then consideration of the merits in the Texas Court of Criminal Appeals.

Similarly in *Franks v. Delaware, supra,* in a motion for new trial Franks reurged his objection to admission of evidence and stated he "should have been allowed to impeach the affidavit used in the Search Warrant to show purposeful misrepresentation of information contained therein." The motion was denied and on appeal the conviction and sentence affirmed by the Supreme Court of Delaware holding that in accordance with the majority rule no attack upon the veracity of a warrant affidavit could be made. In the United States Supreme Court respondent argued waiver of the challenge to the veracity of the affidavit as not timely, but the Court held since the Supreme Court of Delaware, as this highest state court disposed of the claim on the merits, the federal question was open to review.

In the instant case petitioner did not attack the size of the trial jury at the time of trial and he did not perfect an appeal. Six years later in an application for habeas corpus based on *Ballew v. Georgia,* 435 U.S. 223 (1978) he raised the issue of the invalidity of the jury. The writ was denied with cursory reasons by the trial judge[2]

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2 The opinion of the Louisiana district court denying Thomas' petition for habeas corpus reads in its entirety:

> Defendant was tried and convicted in 1972 for distribution of cocaine and heroin. He was tried by a five-member jury.
>
> In this application for a writ of habeas corpus, he claims that he was entitled to a twelve-man jury.
>
> The law in effect at that time, Act 59 of 1971, has been

without having had input by the State or a hearing in the State district court.

It is pertinent to note that when applying for a writ of habeas corpus in Louisiana District Court, the petitioner filed a standard form completed by filling in the blanks without any reference to case law, more particularly, *Ballew*. The State District Court opinion merely affirmed the information concerning the appellee's trial and conviction, and observed it was petitioner's contention "that he was entitled to a twelve-man jury." He rejected this contention based on *State v. Martin*, 290 So.2d 872 (1974) and denied the writ.

The fact that the district court did not review the merits of petitioner's claim in light of *Ballew* is confirmed by the writ to the Louisiana Supreme Court wherein petitioner states, "It is respectfully submitted that the court below erroneously interpreted petitioner's application; petitioner did not claim that he was entitled to a twelve-man jury." It would be ludicrous to believe that the few sentences comprising the State District Court's opinion on this important issue constituted a review of the merits; especially since the case which probably prompted the appellee's application for a writ of habeas corpus, *Ballew v. Georgia, supra*, was never considered by the State District Court.

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interpreted to entitle a defendant to only a five-member jury. *State v. Martin*, 290 So.2d 872 (La. 1974).
The application is denied. Thomas' petition to the Supreme Court of Louisiana for a writ of certiorari to review this decision was denied without opinion.

The Supreme Court of Louisiana denied the writ of habeas corpus on this critical matter without rendering any opinion and it certainly cannot be said this constituted a review of the merits.

However, even if it is found that the State District Court reviewed the merits, the review was cursory at best.

In the recent case of *Hockenbury v. Sowders*, 620 F.2d 111, the 6th Circuit Court of Appeals held:

> ". . . the courts' review of the merits of the petitioner's claim was cursory at best. . . Consequently, we conclude that the Kentucky Supreme Court's denial of petitioner's claim was substantially based on the state procedural ground, despite the cursory review of the merits of the petitioner's claim."

The 6th Circuit in *Hockenbury, supra*, also declared the following:

> ". . . the Federal Court must determine whether the petitioner's failure to comply with the contemporaneous objection requirement was a substantial basis of the state court's denial of the petitioner's claim."

It is respectfully submitted there has not been a review on the merits in the State court, particularly the

highest court in the state, in accordance with the standard intended by this Court. Thus, the Court below should have considered the question of "cause and prejudice" to determine if petitioner in habeas corpus could belatedly raise his attack

Since the court below reviewed the merits instead of determining if cause and prejudice was established, a conflict arises between the decision of the Court below and prior decisions of this Court, compelling the granting of a writ of certiorari.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the issues herein, or alternatively, the case should be remanded to the United States Court of Appeals for the Fifth Circuit to consider whether petitioner established "cause and prejudice" to bring a belated attack.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Petition for Writ of Certiorari have been mailed, postage prepaid to the following:

Robert M. Steeg
1100 Tulane Ave.
Suite 1440
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I further certify that all parties required to be served have been served.

New Orleans, Louisiana this ____ day of November, 1980.

APPENDIX

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

NO. 79-2176

IRVIN THOMAS

versus

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY

AUG. 7, 1980

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN and POLITZ, Circuit Judges, and SMITH*, District Judge.

ALVIN B. RUBIN, Circuit Judge:

In *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), the United States Supreme Court held that conducting a criminal trial before a jury consisting of only five members deprives the defendant of his right to trial by jury under the sixth amendment as

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* Senior District Judge of the Northern District of Mississippi sitting by designation.

applied to the states by the fourteenth. This habeas corpus petition seeks retroactive application of that decision in order to invalidate Irvin Thomas' conviction by a five-member Louisiana jury. Concluding that *Ballew* is retroactive, we affirm the district court decision according Thomas relief.

Only last month the Supreme Court considered a similar problem. In *Burch v. Louisiana*, 441 U.S. 130, 99 S.Ct. 1623, 60 L.Ed.2d 96 (1979) the Court held that a 5-1 verdict convicting the defendant of a non-petty offense violates the right to jury trial. In *Brown v. Louisiana*, ____ U.S. ____, 100 S.Ct. 2214, 64 L.Ed.2d ____ (1980), the Court held that *Burch* should be applied retroactively. Four members of the Court (Justices Brennan, Stewart, Marshall and Blackmun) joined in the plurality opinion. Justices Powell and Stevens concurred in the judgment but would have limited retroactive application to cases pending on direct review at the time the new constitutional rule was announced. Thomas' original state proceedings were completed in 1972, so his case does not meet the requirements of the concurring opinion. Nonetheless, we conclude that the authority of the *Brown* decision constrains us to reach the same result.

The factors to be considered have been fully set forth in *Hankerson v. North Carolina*, 432 U.S. 233, 97 S.Ct. 2339, 53 L.Ed.2d 306 (1977); *Michigan v. Payne*, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973); *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248

(1969); *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967); *Johnson v. New Jersey*, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); and *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). They were all again reviewed in *Brown*. The three criteria are:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. Denno, 388 U.S. 293, 297, 87 S.Ct. 1967, 1970, 18 L.Ed.2d 1199, 1203 (1967).

"Foremost among these factors is the purpose to be served by the new constitutional rule." *Desist v. United States*, 394 U.S. 244, 249, 89 S.Ct. 1030, 1033, 22 L.Ed.2d 248, 255 (1969) (footnote omitted). Indeed, the other two factors are determinative "only when the purpose of the rule in question (does) not clearly favor either retroactivity or prospectivity." *Brown v. Louisiana*, ____ U.S. ____, ____, 100 S.Ct. 2214, 2219, 64 L.Ed.2d ____, ____ (1980). (brackets in original.) "Where the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past

trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Id.* (quoting *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388, 395 (1971) (plurality opinion)).

To demonstrate that the purpose of *Ballew* was to "overcome an aspect of the criminal trial that substantially impairs its truth-finding function," *Brown v. Louisiana*, ____ U.S. at ____, 100 S.Ct. at 2219, 64 L.Ed.2d at ____, and to demonstrate that the Supreme Court views the purpose of *Ballew* as indistinguishable from the purpose of *Burch*, so that both must be given retroactive application if either is, we need only quote from the analysis in *Brown*:

> We think it apparent that the rationale behind the constitutional rule announced in *Burch* mandates its retroactive application. Mr. Justice Blackmun's opinion in *Ballew* catalogued the several considerations that led the Court to conclude that the operation of the Jury was inhibited to a constitutionally significant degree by reducing its size to five members. Prominent among these concerns was the recognition, supported by a number of empirical studies, that a decline in jury size

leads to less accurate fact-finding and greater risk of convicting an innocent person. 435 U.S. at 232-235 (95 S.Ct. 1029). In addition, statistical and empirical data established that because of a concomitant decrease in the number of hung juries, a reduction in the size of the jury panel in criminal cases unfairly disadvantages one side — the defense. *Id.*, at 236 (98 S.Ct. 1029). Lastly, the opinion noted that the opportunity for meaningful and appropriate minority representation diminishes with the size of the jury. *Id.*, at 236-237 (98 S.Ct. 1029).

Identical considerations underlay our decision in *Burch*. The threat which conviction by a 5 to 0 verdict poses to the fairness of the proceeding and the proper role of the jury is not significantly alleviated when conviction is instead obtained by the addition of a sixth, but dissenting, ballot. When the requirement of unanimity is abandoned, the vote of the "additional" juror is essentially superfluous. The prosecution's demonstrated inability to convince all the jurors of the accused's guilt certainly does nothing to allay our concern about the reliability and accuracy of the jury's verdict. And while the addition of another juror to the five-person panel may statistically increase the representativeness of that body, relinquishment of the unanimity requirement

removes any guarantee that the minority voices will actually be heard.

In sum, *Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict. It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial — the very integrity of the fact-finding process." *Linkletter v. Walker*, 381 U.S. 618, 639, 85 S.Ct. 1731, 1743, 14 L.Ed.2d 601 (1965). "The basic purpose of a trial is the determination of truth," *Tehan v. Shott*, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966), and it is the jury to whom we have entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself. The rule in *Burch* was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application. ____ U.S. ____, 100 S.Ct. at 2222, 64 L.Ed.2d at ____. (footnotes omitted).

The recognition that *Ballew* and *Burch* share the same purpose mandates that *Ballew* also be applied retroactively, regardless of good-faith reliance by the state on the former rule or disruptive effect on the administra-

tion of justice. See *Williams v. United States*, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152, 28 L.Ed.2d 388, 395 (1971) (plurality opinion). Moreover, retroactive application of the *Ballew* rule will not have a devastating impact on the administration of the criminal law. Only two states other than Louisiana — Georgia and Virginia — have utilized five-person juries, and they did so only in misdemeanor cases. In 1974, by revision of the Louisiana Constitution and of the state's Code of Criminal Procedure, the five-member jury (or as it was called locally, the bob-tail jury) was eliminated.

Thus in Louisiana only persons convicted prior to 1974 could attack the statute. It applied only to cases for which a prison sentence was not mandatory. La. Code Crim. Pro. Ann. art. 782 (West 1966) (amended 1974). Some of those convicted by five-member juries were no doubt not sentenced to prison and others sentenced to prison have no doubt been released. The state at oral argument could not give an estimate of the number but it did not contend that the affected group is large. Furthermore, what the Supreme Court said in *Brown* is applicable here as well:

> What little disruption to the administration of justice results from retroactive application of *Burch* "must be considered part of the price we pay for former failures to provide fair procedures." *Adams v. Illinois*, (405 U.S. 278, 92 S.Ct. 916, 31 L.Ed.2d 202) *supra*, at 297 (92 S.Ct. at 926) (Douglas, J., dissenting).

____ U.S. at ____, 100 S.Ct. at 2224, 64 L.Ed.2d at ____.

Finally, we consider the state's claim that Irvin Thomas' failure to challenge the five-member jury at the time of his criminal trial, as required by Louisiana's contemporaneous objection rule, La. Code Crim. Pro. Ann. art. 841 (West 1966) (amended 1974), should bar him from bringing his federal constitutional claim in this federal habeas action. The denial of habeas corpus relief in the state courts was not based upon his violation of Louisiana's contemporaneous objection rule but rather was a decision on the merits,[1] and a federal court can, therefore, also reach the merits of his claim for habeas relief, without considering whether he satisfies the cause-and-prejudice test established by *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977); *County Court v. Allen*, 442 U.S. 140, 146-155, 99 S.Ct. 2213, 2219-23, 60 L.Ed.2d 777, 785-791 (1979); *Cannon v. Alabama*, 558 F.2d 1211, 1216 n.12 (5th Cir. 1977), cert. denied, 434 U.S. 1087, 98 S.Ct. 1281, 55 L.Ed.2d 792 (1978); see *Castaneda v. Partida*, 430 U.S. 482,

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1 The opinion of the Louisiana district court denying Thomas' petition for habeas corpus reads in its entirety:

Defendant was tried and convicted in 1972 for distribution of cocaine and heroin. He was tried by a five-member jury.

In this application for a writ of habeas corpus, he claims that he was entitled to a twelve-man jury.

The law in effect at that time, Act 59 of 1971, has been interpreted to entitle a defendant to only a five-member jury. *State v. Martin*, 290 So.2d 872 (La. 1974).

The application is denied.

Thomas' petition of the Supreme Court of Louisiana for a writ of certiorari to review this decision was denied without opinion.

486 n.4, 97 S.Ct. 1272, 1275 n.4, 51 L.Ed.2d 498, 505 n.4 (1977); *see also Franks v. Delaware*, 438 U.S. 154, 161-163, 98 S.Ct. 2674, 2679-80, 57 L.Ed.2d 667, 675-677 (1978); *Mullaney v. Wilbur*, 421 U.S. 684, 704 n.*, 95 S.Ct. 1881, 1892 n.*, 44 L.Ed.2d 508, 523 n.* (1975) (concurring opinion of Justice Rehnquist).

For these reasons, the decision of the trial court requiring Louisiana either again to try Thomas before a properly constituted jury or to release him is AFFIRMED.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

October 9, 1980

Gilbert F. Ganucheau
Clerk

TO ALL PARTIES LISTED BELOW:

NO. 79-2176 IRVIN THOMAS -vs- FRANK BLACKBURN, Warden, LOUISIANA STATE PENITENTIARY
(CA-78-1390)

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

/s/ P. Keller
Deputy Clerk

cc: Mr. Leonard Knapp, Jr.
Ms. Barbara Rutledge
Mr. Robert M. Steeg

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

IRVIN THOMAS

versus

FRANK BLACKBURN, WARDEN
LOUISIANA STATE PENITENTIARY

CIVIL ACTION NO. 781399

VERON, District Judge:

After a jury trial in the Fourteenth Judicial District Court, Parish of Calcasieu, Louisiana, the petitioner, Irvin Thomas, was convicted of unlawful distribution of cocaine and heroin in violation of Louisiana Revised Statutes 40:971(a)(1). He was sentenced to twenty-seven years hard labor in the custody of the Louisiana Department of Corrections and is presently in the respondent's custody serving that sentence. Petitioner did not appeal his conviction. He has now filed in this court a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254.

In compliance with Louisiana law at the time[1] petitioner was tried and convicted by a jury composed of

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1 Louisiana Code of Criminal Procedure Article 782 at the time of this petitioner's trial did permit juries of five members in cases in which hard labor was optional. The jury had to act unanimous-

five members. The United States Supreme Court recently held that a five-member jury does not satisfy the jury trial guarantee of the Sixth Amendment, as applied to the States through the Fourteenth Amendment. *Ballew v. Georgia*, 435 U.S. 223 (1978).

In his present petition, petitioner contends that his conviction was obtained in violation of his federal constitutional rights. Specifically, petitioner, armed with the *Ballew* decision, argues that he was denied his right to trial by jury guaranteed by the Sixth and Fourteenth Amendments[2] to the United States Constitution. Petitioner's application for a writ of habeas corpus was denied at both the State district court[3] and

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ly in order to convict.

Effective January 1, 1975 Article 782 was amended by the Louisiana legislature to provide that "(c)ases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, five of whom must concur to render a verdict," In *Burch v. Louisiana*, 365 So.2d 1236, 1264 (La. 1978), *cert. granted* 47 U.S.L.W. 3301 (Oct. 31, 1978), the Louisiana Supreme Court held that a conviction by a nonunanimous six-person jury is constitutional. On April 17, 1979 the United States Supreme Court reversed. The Court did not resolve or discuss the retroactivity-prospectivity question of *Burch* in its decision. We express no opinion whatsoever on this different issue since it is not before us, and nothing in this ruling should be so construed.

2 The Fourteenth Amendment guarantees the right of trial by jury in all state nonpetty criminal cases. *Duncan v. Louisiana*, 391 U.S. 145, 159-162 (1968).

3 The State trial court in denying petitioner on June 7, 1978 a writ of habeas corpus interpreted petitioner's claim as being that he was entitled to a twelve-person jury. The State district court's

Supreme Court[4] levels. Petitioner has therefore exhausted his available state remedies with respect to the question as required by 28 U.S.C. §2254(b). *See generally* 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §4264 (1978). The case has been submitted on briefs and the State court record.

In determining the merits of petitioner's claim, this court must resolve two issues: first, whether the defendant can raise this constitutional issue for the first time in a writ of habeas corpus never having raised the issue at the State trial court level[5] and, second,

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opinion in its entirety reads:

> Defendant was tried and convicted in 1972 for distribution of cocaine and heroin. He was tried by a five-member jury.
>
> In this application for a writ of habeas corpus, he claims that he was entitled to a twelve-man jury.
>
> The law in effect at that time, Act 59 of 1971, has been interpreted to entitle a defendant to only a five-member jury. *State v. Martin*, 290 So.2d 872 (La. 1974).
>
> The application is denied.

4 The Louisiana Supreme Court unanimously denied petitioner's writ on September 1, 1978 without written reasons. However, an examination of petitioner's application for a writ of habeas corpus with the Louisiana Supreme Court clearly reveals that the same constitutional claim was there raised. The exhaustion requirement "cannot turn upon whether a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Smith v. Digmon*, 434 U.S. 332, 333 (1978). The Louisiana Supreme Court recently held in a direct appeal case that *Ballew* should not be applied retroactively. *State v. Robinson*, 361 So.2d 864 (La. 1978). *(per curiam.)*.

5 The record of the State Court trial was not transcribed, but the petitioner admits in his application for a writ of habeas corpus filed with the Louisiana Supreme Court that no challenge to the constitutionality of the jury was made at the State trial court level.

whether the *Ballew* decision should be applied retroactively. Both issues, of course must be resolved in petitioner's favor in order for the writ to issue.

I. PROCEDURAL DEFAULT

The State argues that the petitioner's failure to raise the issue of constitutionality of Louisiana's five man jury at the State trial level bars federal habeas relief on this ground. The State relies on its procedural default rule which provides that "(a)n irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence."[6] Louisiana Code of Criminal Procedure Article 841. *E.g., State v. Hall,* 350 So.2d 141 (La. 1977); *State v. Madison,* 345 So.2d 485 (La. 1977); *State v. Williams,* 343 So.2d 1026 (La. 1977). This procedural rule is designed to promote judicial efficiency

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6 Thomas' procedural default here may not be covered by Louisiana's contemporaneous objection rule, since "an error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence" can be considered on appeal. Louisiana Code of Criminal Procedure Article 920(2). An error in the size of the jury is discoverable on the face of the record and therefore can be noted *ex proprio motu* without formal objection or an assignment of error. *State v. Smith,* 367 So.2d 857 (La. 1979); *State v. Nedds,* 364 So.2d 588 (La. 1978). However, in these previous cases the verdicts were returned by juries composed of either more or less than the correct number authorized by State statute. This is not the case here. However, the Louisiana Supreme Court recently held in a direct appeal case that *Ballew* should not be applied retroactively without any discussion of whether the alleged error was raised at trial. *State v. Robinson,* 361 So.2d 864 (La. 1978). *See also State v. Wrestle, Inc.,* 360 So.2d 831, 837 n. 9 (La. 1978).

by providing an adequate opportunity for the recognition and correction of errors during trial. *State v. Dupre*, 339 So.2d 10 (La. 1976); *State v. Charles*, 326 So.2d 335 (La. 1967).

In *Fay v. Noia*, 372 U.S. 391 (1963), the United States Supreme Court held that a federal court, hearing a habeas corpus application, might consider a constitutional claim not raised in State court if the petitioner had not deliberately bypassed orderly state procedures. However, more recent Supreme Court decisions have narrowed and modified the *Fay* standard.

The standard announced in *Davis v. United States*,[7] 411 U.S. 233 (1973), as extended by *Francis v. Henderson*,[8] 425

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7 *Davis v. United States*, supra, involved a federal prisoner who had failed to bring a constitutional challenge to grand jury composition before trial as required by Federal Rule of Criminal Procedure 12(b)(2). The prisoner then brought a proceeding pursuant to 28 U.S.C. §2255 asking that the conviction be set aside because of the composition of the indicting grand jury. The Court held that the waiver standard of Rule 16 ("the Court for cause shown may grant relief from the waiver") controls not only during the criminal proceeding but also on collateral review.

8 In *Francis v. Henderson*, supra, the predecessor statute to Louisiana Code of Criminal Procedure Article 535(B)(3), providing that grand jury composition issues not raised prior to trial are waived, was in issue. A Louisiana prisoner who had not appealed his conviction sought federal collateral relief under section 2254 on grounds that the grand jury which has indicted him was illegally constituted. Largely on the basis of *Davis v. United States*, *supra*, the Supreme Court affirmed the denial of relief.

U.S. 536 (1976), and *Wainwright v. Sykes,*[9] 433 U.S. 72 (1977), is that a prisoner may not raise in a federal habeas proceeding a constitutional claim he did not present to the State courts because of his failure to comply with a State court procedural rule, absent some showing of cause for his non-compliance with State rule and a showing of actual prejudice resulting from the failure to object. *See generally* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §4266 (1978); Spritzer, *Criminal Waiver, Procedural Default And The Burger Court,* 126 U. PA. L. REV. 473, 508-509 (1978). The Court explicitly declined to define the cause and prejudice standard, noting only that it was narrower than the "deliberate bypass" test of *Fay. Wainwright v. Sykes,* supra, 433 U.S. at 87. However, the Court did admonish that the standard's application should not be permitted to work a "miscarriage of justice":

> The "cause" — and — "prejudice" exception of the *Francis* rule will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for

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9 In *Wainwright v. Skyes, supra,* a state prisoner sought habeas corpus on the ground that he had not understood the *Miranda* warnings administered to him. At his trial the petitioner had not challenged the admissibility of the inculpatory statements he made after being given the warnings. The Court held that the failure to comply with the State rule requiring contemporaneous objection to the admission of his statements barred habeas relief since the petitioner could not show cause for his failure to object at the time and actual prejudice.

> the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here. Respondent has advanced no explanation whatever for his failure to object at trial, and, as the proceeding unfolded, the trial judge is certainly not to be faulted for failing to question the admission of the confession himself. The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of his inculpatory statement.

Id. at 90-91 (footnote omitted).

The Court's justification for enactment of such a standard was that it would promote finality in litigation and discourage "sandbagging" on the part of defense attorneys "who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off." *Id.* at 89. Tactical considerations sometimes militate in favor of delaying the raising of the claim in the hope of an acquittal. If this hope does not materialize, the claim

could then be used to upset an otherwise valid conviction when reprosecution might well be difficult.

As additional fortification for its holding, the Court that state procedural forfeiture rules are entitled to greater respect than that granted by the deliberate bypass rule. *Id.* at 88-89.

The United States Supreme Court has not refined the cause and prejudice standard since *Sykes*,[10] and the Fifth Circuit has not yet had the opportunity to delineate clearly or dispositively those terms for our guidance.[11]

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10 The United States Supreme Court has vacated at least two judgments and remanded the cases for further consideration in light of *Wainwright v. Sykes, supra. Gunn v. Poulin*, 434 U.S. 936 (1977); *Estelle v. McDonald*, 433 U.S. 904 (1977). *See also Browder v. Director*, 434 U.S. 257, 259 (1978).

11 "Whether Spinkelink's procedural default actually falls within the ambit of *Wainwright v. Sykes, supra*, and concomitantly, whether sufficient cause or prejudice exists in this case so as not to bar federal habeas corpus review, are *difficult questions on which we need not pass*. Spinkelink's contentions regarding the exclusion of the two veniremen must fail on the merits as a matter of law for reasons to be discussed; the petitioner thus is not entitled to relief on the basis of these contentions even if *Wainwright v. Sykes* does not prevent him from raising them." *Spinkelink v. Wainwright*, 578 F.2d 582, 592 (5th Cir. 1978) (emphasis supplied.) *See also McDonald v. Estelle*, 564 F.2d 199 (5th Cir. 1977); *St. John v. Estelle*, 563 F.2d 168 (5th Cir. 1977); *Jiminez v. Estelle*, 557 F.2d 506 (5th Cir. 1977); *Evans v. Maggio*, 557 F.2d 430, (5th Cir. 1977); *Loud v. Estelle*, 556 F.2d 1326 (1977).

A) Cause

In the case at bar, no reasonable trial strategy could have warranted defense counsel's failure to challenge the constitutionality of the five-member jury. The failure of court-appointed defense to raise this issue is best presumed inadvertant. At the very least, counsel's failure to preserve this client's position was for an excusable reasons — ignorance of the potential unconstitutionality of Louisiana's jury system. At the time of trial, court-appointed counsel may have assumed Louisiana's jury system was constitutional, since there was little indication to the contrary in the available relevant jurisprudence.[12]

In the heat of trial it is unreasonable and at time in fact undesirable to require counsel to raise every conceivable constitutional argument. The instant case is distinguishable from previous State procedural default cases in that in the earlier cases the prevailing law at the time of trial should have prompted defense counsel's vigorous objection and failure to so object could there be interpreted as trial strategy. Thus, in our opinion, there was legitimate cause for failing to object to the size of the jury on Sixth Amendment grounds.

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12 In *Williams v. Florida*, 399 U.S. 78 (1970), the use of a six-member jury in a state criminal trial was upheld. The court in a footnote explicitly cautioned: "We have no occasion in this case to determine what minimum number can still constitute a 'jury,' but we do not doubt that six is above that minimum." *Id.* at 91, n. 28.

B. Prejudice

While the Supreme Court did not define the term "prejudice" in *Sykes*, two Justices indicated that prejudice was to be determined under the harmless error test. See *Sykes v. Wainwright, supra*, 433 U.S. at 97-98 (White, J. concurring); 433 U.S. at 117 (Brennan, J., dissenting).

In *Chapman v. California*, 386 U.S. 18 (1967), the Supreme Court observed that there might be some error of constitutional magnitude that might, in a particular case, be so unimportant and insignificant as to be harmless. An error cannot be so classified, however, unless the reviewing court is able to say, beyond a reasonable doubt, that there was no reasonable possibility that the error might have contributed to the conviction. *Id.* at 24. Furthermore, and of utmost significance here, the Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Id.* at 23.[13] "(T)rial by jury in criminal cases is fundamental to the American scheme of justice",[14] and in our belief an

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13 For example, when the error is a coerced confession, denial of counsel, or lack of an impartial judge, the error infects the entire proceeding making it impossible to evaluate the effect of the error on the jury. As a consequence, reversal is automatic with such errors. *Chapman v. California, supra*, 386 U.S. at 23, n. 8. *See generally Note, Harmless Constitutional Error: A Reappraisal*, 83 Harv. L. Rev. 814, 820-24 (1970).

14 *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

infraction or erosion of it should never be treated as harmless error.

We are cognizant that the majority of the Court in *Sykes* arguably may have intended the term "prejudice" in some circumstances to encompass a more rigorous test than the harmless error standard. Some have argued "prejudice" means a serious doubt of the defendant's guilt. *E.g., Canary v. Bland*, 583 F.2d 887, 894 (6th Cir. 1978) (Merritt, J., concurring); *Collins v. Auger*, 577 F.2d 1107, 1110-1111 (8th Cir. 1978).

This view, in sharp contrast to the harmless error test, would require a subjective evaluation of guilt by the reviewing court based on the overall record. While this standard may be justified in instances such as evaluating the materiality of the admission of incriminating evidence or the omission of exculpatory evidence, in our opinion this test is simply inadequate to protect vigilantly the constitutional right to jury trial, a right which lies at the center of our American legal system.

The application of the harmless error standard (more precisely an exception to the harmless error standard) in this case insures against "a miscarriage of justice." In choosing this standard we have given full credence to Justice Stevens' observation that "(m)atters such as the competence of counsel, the procedural context in which the asserted waiver occurred; the character of the constitutional right at stake, and the overall fair-

ness of the entire proceeding, may be more significant than the language of the test the Court purports to apply." *Wainwright v. Sykes*, supra, 433 U.S. at 96 (Stevens, J., concurring). We conclude that the error here went to the central issue of guilt or innocence and infected the fairness of the trial itself. In short, petitioner clears the "prejudice" hurdle to our satisfaction.

II. RETROACTIVITY

In *Ballew v. Georgia, supra*, a unanimous Court held that the five-member jury does not satisfy the jury trial guarantee of the Sixth Amendment, as applied to the States via the Fourteenth Amendment. As a threshold matter, the *Ballew* decision does not establish a new principle of law by deciding an issue of first impression whose resolution was not clearly foreshowed.[15] The instant case therefore properly presents a retroactivity/prospectivity question.

The Court, however, did not indicate in the opinion itself whether *Ballew* should be applied retroactively.[16]

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15 *See* note 12 *supra*.

16 The Court vacated the judgment in *Robinson v. Georgia*, 435 U.S. 991 (1978), for further consideration in light of *Ballew*.

In some instances the Court has announced its resolution of the retroactivity/prospectivity question in the case announcing the new constitutional rule. *E.g., Morissey v. Brewer*, 408 U.S. 471 (1972). In other instances the Court has given full consideration to the retroactivity issue in a case after the law-changing decision. *E.g., Linkletter v. Walker*, 381 U.S. 618 (1965). Sometimes the Court has decided the matter in summary fashion without briefing or oral

The question, therefore, is whether the *Ballew* holding is to be applied retroactively to other defendants whose opportunity to raise a timely objection to the jury numerical composition had passed as of the date of the decision in *Ballew*.

While the subject of retroactivity is inherently ripe with jurisprudential overtones,[17] the Court has not heretofore resolved the issue of retroactivity "on the basis of arguments about whether judges 'make' law or 'discover' it when performing their duty of interpreting the Constitution," *Linkletter v. Walker*, 381 U.S. 618, 643 (1965) (Black, J., dissenting).

It is axiomatic that "the Federal Constitution has no voice upon the subject" of retroactivity, (*General Northern Railway v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1962) (Cardozo, J.), and that the "Constitution neither prohibits nor requires retroactive effect." *Linkletter v. Walker, supra*, 381 U.S. at 629. Thus, in order to assist in weighing the various merits and demerits of applying a new rule retroactively, the Court delineated and has

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argument through a later per curiam opinion. *E.g., Roberts v. Russell*, 392 U.S. 293 (1968).

For excellent discussions of retroactivity generally *see Beytagh, Ten Years of Non-Retroactivity: A Critique and A Proposal*, 61 Va.L.Rev. 1557 (1975); Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y. U. L. Rev. 631 (1967).

17 Proponents of Blackstonian declaratory theory generally would give retroactive effect to law changing decisions, while the adherents of Austinian or realist doctrine generally would not.

steadfastly adhered[18] to three relevant factors which should control all retroactivity decisions:

> (a) the purpose to be served by the new standards,
>
> (b) the extent of the reliance by law enforcement authorities on the old standards, and
>
> (c) the effect on the administration of justice of a retroactive application of the new standards.

Stovall v. Denno, 388 U.S. 293, 297 (1967).

The court later established a hierarchy among the controlling criteria. The foremost factor "is the purpose to be served by the new constitutional rule." *Desist v. United States*, 394 U.S. 224, 249 (1969). Reliance and the administration of justice are considered only "when the purpose of the rule in question (does) not clearly favor either retroactivity or prospectivity." *Id.* at 250.

The Supreme Court has consistently disdained any distinction between cases on direct review and those arising on collateral attack. *Williams v. United States*, 401 U.S. 646, 651-53 (1971); *Desist v. United States, supra*, 394 U.S. at 253; *Johnson v. New Jersey*, 384 U.S. 719, 732

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18 These standards were first enunciated in *Linkletter v. Walker, supra*. The Court has consistently relied upon these three criteria. *See, e.g., Adams v. Illinois*, 405 U.S. 278 (1972); *Desist v. United States*, 394 U.S. 244 (1969); *DeStefano v. Woods*, 392 U.S. 631 (1968).

(1966). Therefore, the *Stovall* three pronged test controls our retroactivity inquiry in this habeas corpus proceeding.

If the purpose of a new constitutional rule is to guarantee "the very integrity of the fact finding process" (*Linkletter v. Walker, supra,* 381 U.S. at 639) and thus to insure the fundamental fairness of trial, retroactive application is necessary. However, if the purpose of the new rule is simply the prophylactic one of deterring illegal police activity, then prospectivity is acceptable.[19]

The Supreme Court's decision in *Ivan v. City of New York,* 407 U.S. 203 (1972), is particularly relevant to the case at bar. In *Ivan* the Court ruled that the holding in *In re Winship,* 397 U.S. 358 (1970), that proof beyond a reasonable doubt is among the essentials of due process and fair treatment that must be afforded a juvenile charged with an act that would constitute a crime if committed by an adult should be afforded retroactive effect. In so holding the Court stated:

Where the major purpose of new con-

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19 For example, in *Linkletter v. Walker, supra,* the Supreme Court held that the *Mapp v. Ohio,* 367 U.S. 643 (1961), exclusionary rule was inapplicable to cases in which the convictions had become final before the decision date of *Mapp,* largely because the deterrent purpose of *Mapp* would not be served by retroactive application.

In *Tehan v. United States ex rel Shott,* 382 U.S. 406 (1966), the Court refused effect to the Fifth Amendment rule of *Griffin v. California,* 380 U.S. 609 (1965), prohibiting adverse comment on a defendant's failure to testify.

> stitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect. Neither good-faith reliance by state or federal authorities on prior constitutional law or accepted practice, nor severe impact on the administration of justice has sufficed to require prospective application in these circumstances." *Williams v. United States*, 401 U.S. 646, 653 (1971). See *Adams v. Illinois*, 405 U.S. 278, 280 (1972); *Roberts v. Russell*, 392 U.S. 293, 295 (1968).

Ivan v. City of New York, supra, 407 U.S. at 204, *See also Hankerson v. North Carolina*, 432 U.S. 233 (1977).

In like vein, *Waller v. Florida*, 397 U.S. 387 (1970), which barred on double jeopardy grounds state and municipal prosecutions, based on the same act or offense, was given full retroactive effect in *Robinson v. Neil*, 409 U.S. 505 (1973). There the Court observed:

> The guarantee against double jeopardy is significantly different from procedural guarantees held in the *Linkletter* line of cases to have prospective effect only. While this guarantee like the others, is a constitutional right of the criminal defendant, its practical result is to

> prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial. A number of the constitutional rules applied prospectively only under the *Linkletter* cases were found not to affect the basic fairness of the earlier trial, but to have been directed instead to collateral purposes such as the deterrence of unlawful police conduct. . .

Id. at 509.

Just like the guarantee against double jeopardy, the right to trial by jury is significantly different from the procedural guarantees of the *Linkletter* line of cases. The purpose of the new rule can be gleaned from the *Ballew* opinion itself — to insure the basic fairness of the trial and the reliability of the fact finding process. In light of the revelations brought to surface by the empirical studies on jury size analyzed by the *Ballew* Court, a jury panel of less than six members inhibits the functioning of the jury to a significant degree, thereby directly affecting the reliability of the fact finding process itself.

In its examination of jury size studies, the *Ballew* Court stated preliminarily that "recent empirical data suggest that progressively smaller juries are less likely to foster effective group deliberation" and "(a)t some point this decline leads to inaccurate fact finding."

Ballew v. Georgia, supra, 435 U.S. at 232. Additionally, the Court noted that "the data now raise doubts about the accuracy of the results achieved by smaller and smaller panels. Statistical studies suggest that the risk of convicting an innocent person rises as the size of the jury diminishes." *Id.* at 234 (parenthetical omitted). Furthermore, "the data suggest that the verdicts of jury deliberation in criminal cases will vary as juries become smaller, and that the variance amounts to an imbalance to the detriment of one side, the defense." *Id.* at 236. Such empirical information leads the Court to conclude that "the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members." *Id.* at 239.

Thus, the purpose of the rule here in question clearly favors retroactivity. While *Desist v. United States, supra,* makes it clear that reliance by law enforcement and the administration of justice factors need not be analyzed when the purpose factor clearly militates in favor of retroactivity, out of an abundance of caution we consider these two other factors independently.

The State may have assumed Louisiana's jury system was constitutional just as court-appointed counsel did, since there was little indication to the contrary in the prevailing jurisprudence.[20]

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20 *See* note 12 *supra.* This factor however does not favor prospective application as strongly as a reversal of clear precedent would. For example, *DeStefano v. Woods,* 392 U.S. 631, 634 (1968), the Court reasoned that the reliance factor favored prospectivity

The effect on the administration of justice of a holding of general retroactivity of *Ballew* would not be significant since only Louisiana,[21] Georgia, and Virginia have utilized five-member juries. Moreover, Georgia[22] and Virginia[23] only sanctioned panels of five in

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because past opinions of the Court clearly indicated that the Sixth Amendment right to jury trial was not applicable to the States and "the States undoubtedly relied upon in good faith" on those decisions.

One could argue that the State should be held to a higher standard of good faith reliance than court-appointed defense counsel. The reasoning would be that since only three states allowed five-member juries (and in two of these states only misdemeanor cases could be so tried), those states' legislatures and Attorney General offices should have been attuned to the potential unconstitutionality of their procedures. We stop short of endorsing such logic since it is not necessary to our holding herein.

21 While Louisiana did permit juries of five members in cases in which hard labor was optional, The State legislature amended the law effective January 1, 1975 to provide for six-member juries in these cases. *See* note 1 *supra*.

I had the privilege of sitting on the state district court bench for nearly ten years prior to my federal court appointment and from that experience I believe a holding of *Ballew* retroactively would not affect a substantial number of Louisiana prisoners presently incarcerated.

This court's attempts at various levels to secure statistics on the number of Louisiana prisoners presently imprisoned pursuant to conviction by five-member juries proved unsuccessful.

22 Ga. Const., Art. 6 §16, 31, codified as Ga. Code §2.5101 (1973), and to 1890-1891 Ga. Laws, Vol. 2, No. 278, pp. 937-938 and 1935 Ga. Laws, No. 38, p. 498. It is reasonable to assume that a holding of *Ballew* retroactively would not result in the discharge of a significant number of Georgia prisoners presently incarcerated for misdemeanor convictions.

23 Va. Code Ann. §19.2-262 (2) (1975). It is reasonable to assume that a holding in *Ballew* retroactively would not result in

misdemeanor cases. Thus, a holding of *Ballew* retroactively would simply not result in the widespread opening of state prison gates.

In summary, the application of the three prong balancing test generally supports *Ballew* retroactively for the reasons stated herein.[24] This court therefore holds

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the discharge of a significant number of Virginia prisoners presently incarcerated for misdemeanor violations.

24 Two precedents relating to jury trials are distinguishable. *DeStefano v. Woods*, 392 U.S. 631 (1968), held that the right to trial by jury in state criminal prosecutions which had been established in *Duncan v. Louisiana*, 392 U.S. 145 (1968), and *Bloom v. Illinois*, 391 U.S. 194 (1968), was not retroactive. The Court in *Daniel v. Louisiana*, 420 U.S. 31 (1975), decided not to give retroactive effect to the decision in *Taylor v. Louisiana*, 419 U.S. 522, (1975), invalidating discrimination against women jury service. The following analysis reproduced from *Taylor* when juxtaposed against our analysis of the same three factors here speaks for itself:

> In *Taylor* as in *Duncan* we were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression. In *Taylor*, as in *Duncan*, our decision did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In *Taylor*, as in *Duncan*, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as *Hoyt v. Florida*, 368 U.S. 57 (1961), instructing their criminal justice systems is clear. Here, as in *Duncan*, the requirement of retrying a significant number of persons were *Taylor* to be held retroactive would do little, if anything to vindicate the Sixth Amendment interest at

that the *Ballew v. Georgia* decision retroactively applied to State court convictions which had become final before rendition of the *Ballew* decision. Accordingly, the judgment of conviction and sentence imposed upon petitioner by the Fourteenth Judicial District, Parish of Calcasieu, is vacated.

Now after having reviewed the retroactivity precedents, we appreciate the assessment that the subsequent course of *Linkletter v. Howard, supra,* is "almost as difficult to follow as the tracks of a beast of prey in search of his intended victim." *Mackey v. United States,* 401 U.S. 667, 676 (1971) (Harlan, J., dissenting.) The court recognizes that the issues presented herein are difficult ones of first instance, and the court would thus welcome appellate review.

Therefore, the State will, upon request, be granted a suspensive appeal. In the event of appeal, we respect-

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stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in *Taylor.*

Daniel v. Louisiana, supra, 420 U.S. at 32-33. *See also Duncan v. Louisiana, supra,* 391 U.S. at 158. *Ballew* suggests that criminal trials tried with a jury of five members is inherently less fair than trials with six jurors and utilizing less than six jurors is clearly unconstitutional. It would be ludicrous to suggest that petitioner in order to have the benefit of the *Ballew* rule would have to demonstrate that a sixth member of the jury would have voted for acquittal. The Louisiana Supreme Court recently stated that the verdict returned by "a jury composed of either more or less than the correct number of jurors is null." *State v. Smith,* 367 So.2d 857, 858 (1979).

fully suggest a preferential fixing in the Fifth Circuit. In the event of the failure of the State to appeal this ruling to the United States Court of Appeals for the Fifth Circuit within 30 days from the date hereof or to retry the petitioner within a reasonable time, the writ will be sustained and the petitioner discharged from custody. This disposition is consistent with the statutory provision that the court shall "dispose of the matter as law and justice require." 28 U.S.C. §2243. *See generally* 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, §4268 (1978).

THUS DONE AND SIGNED in chambers at Lake Charles, Louisiana, this 23rd day of April, 1979.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA ex rel.
IRVIN THOMAS

versus

FRANK BLACKBURN, WARDEN,
LOUISIANA STATE PENITENTIARY

NO. 62798

Sept. 1, 1978

In re: Irvin Thomas applying for writ of certiorari and/or supervisory writs. Parish of Calcasieu.

Denied.

14TH JUDICIAL DISTRICT COURT
PARISH OF CALCASIEU
STATE OF LOUISIANA

IRVIN THOMAS

versus

FRANK BLACKBURN, WARDEN

NO. 2593-72

YELVERTON, Judge

Defendant was tried and convicted in 1972 for distribution of cocaine and heroin. He was tried by a five-member jury.

In this application for a writ of habeas corpus, he claims that he was entitled to a twelve-man jury.

The law in effect at that time, Act 5º of 1971, has been interpreted to entitle a defendant to only a five-member jury. *State v. Martin*, 290 So.2d 872 (La. 1974).

This application is denied.

Lake Charles, Louisiana

June 7, 1978